

**EXHIBIT A TO MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE**

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

USANA HEALTH SCIENCES, INC., a
Utah corporation,

Plaintiff,

vs.

BARRY MINKOW, a citizen of California;
FRAUD DISCOVERY INSTITUTE, INC., a
California corporation; JOHN DOES 1-100,

Defendants.

AFFIDAVIT OF BARRY MINKOW

1. I make this Affidavit based upon my personal knowledge, information and belief.
2. I co-founded the Fraud Discovery Institute ("FDI") in 2001 in order to uncover, and focus public attention on, fraudulent activity.
3. My interest in uncovering and educating the public about corporate and consumer fraud stems from my own background. During the 1980s and 1990s, I served seven years in federal prison for securities fraud relating to ZZZZ Best Company. In 2002, I was released from federal probation early, with the support of Assistant United States Attorney James Asperger, the former chief of the major frauds section in the Office of the United States Attorney in the United States District Court for the Central District of California and the lead prosecutor in the ZZZZ Best case. Mr. Asperger supported my early release from probation based upon, among other things, my work with FDI.

4. Since 2002, FDI has uncovered and stopped over \$1 billion in financial fraud, often working closely with agents from the Securities and Exchange Commission, the Federal Bureau of Investigation and the Internal Revenue Service.

5. In October 2005, FDI and I received a letter of commendation from J. Stephen Tidwell and Peter H. Norell of the FBI's white-collar crimes unit, acknowledging our work in assisting the FBI "and other law enforcement agencies identify and help disrupt and dismantle financial frauds totaling millions of dollars." Messrs. Tidwell and Norell specifically explained that our "submission of detailed reports" on various companies and individuals engaged in fraud "was used to launch various investigations and enhance pending investigations that either resulted in indictments and convictions or are pending criminal filings." A copy of the October 24, 2005 letter from Messrs. Tidwell and Norell is attached hereto as Exhibit A.

6. USANA is not the first multi-level marketing business that has been investigated by FDI. Indeed, FDI has a long history of answering consumer questions about multi-level marketing businesses.

7. Through this research on the MLM industry and other information, USANA came to my attention as a potential perpetrator of financial fraud. FDI and I therefore began to investigate USANA in September 2006.

8. In November 2006, I was asked to speak by Whitney Tilson and the Value Investors Conference in New York City. I was assigned to speak about an industry that I believed had a high likelihood of fraudulent behavior and without hesitation I chose the multi-level marketing industry. In particular, I spoke about two MLM companies: Mannetech and USANA.

9. Based upon the information that FDI and I had gathered, and conclusions that I had reached about USANA's business practices and business model, I doubted that USANA would be able to maintain what I believed were its artificially inflated revenue growth figures and stock price. Accordingly, I took short positions in USANA stock.

10. I have never "naked short sold" USANA's stock or any other securities.

11. I have never purchased any securities from USANA nor sold any securities to USANA.

12. FDI has never purchased any securities from USANA nor sold any securities to USANA.

13. Attached hereto as Exhibit B is an appropriately redacted copy of my brokerage statement showing trading activity from September 2006 through March 2007. I previously made my trading records available to the FBI, and by letter dated February 21, 2007, I disclosed to the SEC, FBI and IRS that I had taken a short position in USANA stock. A copy of my February 21, 2007 letter is attached hereto as Exhibit C.

14. Any profit that I realize by short selling USANA's stock will only *partially* cover the expenses incurred by me and FDI in connection with our investigation of USANA.

15. FDI's investigation of USANA continued until February, 2007. As a result of our investigation, FDI and I concluded that in many different ways, USANA's business model, business practices and product claims were, in fact, fraudulent.

16. Our conclusions and the factual basis therefor were published in a nearly 500 page report that FDI delivered to attorneys and investigators for the FBI, SEC and IRS on February 20, 2007. As FDI and I have done in the past, we delivered our report to those federal agencies in order to induce them to open their own, formal investigations into USANA.

17. Shortly thereafter, FDI delivered a copy of its report to *The Wall Street Journal*, which reviewed the allegations and on March 15, 2007 published an article highlighting some of the facts that we uncovered about USANA, together with USANA's denials. A copy of the *Wall Street Journal* article is attached hereto as Exhibit D.

18. Consistent with its mission to educate consumers, investors and the public about financial fraud, FDI also posted video testimony by actual victims of USANA's fraudulent business practices on its Web site and on YouTube.

19. On June 13, 2007, the *New York Post* reported that the SEC had expanded the scope of its already open investigation into USANA's disclosure and trading practices. A copy of the *New York Post* article is attached hereto as Exhibit E.

20. On July 10, 2007, USANA announced that Grant Thornton LLP, its public accounting firm, resigned from its long-standing engagement. In a Form 8-K filed August 1, 2007, USANA explained that Grant Thornton LLP resigned from the engagement due to its disagreement with USANA concerning the scope of Grant Thornton's audit in light of the allegations raised in FDI's report.

21. On July 13, 2007, *The National Business Review*, based in New Zealand, published an article titled "Most people won't get their money back" that independently corroborated some of the allegations in FDI's report. A copy of the *National Business Review* article is attached hereto as Exhibit F.

22. On August 8, 2007, *Forbes.com* reported that the FBI has launched an investigation into USANA. A copy of the *Forbes.com* article is attached hereto as Exhibit G.

23. Because of our public statements and the public's interest in this publicly traded company, FDI and I were sued by USANA. Originally, USANA asserted only defamation and

business disparagement claims against us. In its Amended Complaint, USANA has dropped those claims and substituted new causes of action that are purportedly based on alleged securities fraud.

24. The notion that USANA is pursuing this case because I shorted a few hundred shares of its stock is preposterous. The clear message that USANA is sending through this lawsuit is that critics who dig too deeply will be punished and silenced. By its actions, USANA is, by design and in fact, chilling my, FDI's and others' negative speech about the company.

I understand that this Affidavit is made subject to the penalties relating to unsworn falsification to authorities, 28 U.S.C. § 1746.

Executed by me on September 26, 2007


BARRY MINKOW

**MINKOW AFFIDAVIT
EXHIBIT A**

OCT-26-2005 12:14

310 996 3836

310 996 3836 P.01



U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

11000 Wilshire Blvd.
91344
310 996-3832
October 24, 2005

Mr. Barry Minkow
Fraud Discovery Institute
9770 Carroll Center Road
Suite F
San Diego, CA 92126

RE: Commendation Letter

Dear Mr. Minkow:

The letter is to confirm and acknowledge your work in assisting the Federal Bureau of Investigation (FBI) and other law enforcement agencies identify and help disrupt and dismantle various financial frauds totaling millions of dollars. These frauds involved both ongoing operations and historic cases with many potential and actual victims. In most cases, law enforcement knew little or nothing about these matters before your involvement. Your subsequent submission of detailed reports on the below referenced companies was used to launch various investigations and enhance pending investigations that either resulted in indictments and convictions or are pending criminal filings.

Our records indicate you have submitted detailed written reports on seven (7) companies that were used in our investigations to obtain criminal filings. These include Turning International/Derek Turner (New York Field Office), Financial Advisory Consultants/James Lewis (Los Angeles Field Office), MX Factors/Randy Harding (Los Angeles Field Office), Ware Enterprises/Warren Ware (Miami Field Office), Par Three Financial (Los Angeles Field Office), Chicago Development and Planning/Pat Morgen (San Francisco Field Office), and Rainmaker/Alrezha Dimaghani (New York Field Office).

Moreover, our records indicate that there are also six (6) additional current investigations that we have opened based upon information received from you.

These 13 matters have all been referred to us within the last two (2) years. This accomplishment is worthy of commendation in that you identified millions of dollars of fraud and prevented further potential economic loss to hundreds of

OCT-26-2005 12:15

310 996 3836

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victims. The FBI appreciates your cooperation in these matters and encourages you to continue making us aware of crimes that materially affect the integrity of the financial markets of the United States and the confidence of the investing public.

Sincerely yours,

J. Stephen Tidwell
Assistant Director In Charge

A handwritten signature in black ink, appearing to read "P. H. Norell", is written over the typed name of Peter H. Norell.

By:
Peter H. Norell
Acting Assistant Special Agent In
Charge

cc: Steve Georgi, California Bureau of Security
401 S Street, Suite 101, Sacramento, CA 95814

**MINKOW AFFIDAVIT
EXHIBIT B**

Morgan Stanley ClientService

Account Activity[Search](#) [Download Settings](#)

To search for activity, first select the account you're interested in. You may search by activity, by type, or by activity for a specific security. Adjust the time period to limit the number of items returned. For activity before October 2002, check your statements.

Select an account

Search by Type or Symbol

Trade Activity

Enter Symbol

Symbol Lookup

Time period

30 Day View

09/01/2006

to 03/31/2007

Search

Results: Items 1 - 32 of 32

Activities

Trade Date	Activity	Quantity	Description	Symbol	Price	Amount
3/23/2007	Bought	15.00	PUT USANA HEALTH SCIENCES IN AT 50 EXPIRES 07/21/2007 OPENING UNSOLICITED TRADE	PUNX SJ	5.30	-7,951.50
3/23/2007	Bought	15.00	PUT USANA HEALTH SCIENCES IN AT 50 EXPIRES 07/21/2007 OPENING UNSOLICITED TRADE	PUNX SJ	5.40	-8,101.50
3/23/2007	Bought	15.00	PUT USANA HEALTH SCIENCES IN AT 50 EXPIRES 07/21/2007 OPENING UNSOLICITED TRADE	PUNX SJ	5.60	-8,401.50
3/1/2007	Bought	10.00	PUT USANA HEALTH SCIENCES IN AT 55 EXPIRES 07/21/2007 OPENING UNSOLICITED TRADE	PUNX SK	3.30	-3,301.00
3/1/2007	Bought	25.00	PUT USANA HEALTH SCIENCES IN AT 55 EXPIRES 07/21/2007 OPENING UNSOLICITED TRADE	PUNX SK	3.30	-8,252.50
3/1/2007	Bought	25.00	PUT USANA HEALTH SCIENCES IN AT 55 EXPIRES 07/21/2007 OPENING UNSOLICITED TRADE	PUNX SK	3.30	-8,252.50
2/27/2007	Bought	10.00	PUT USANA HEALTH SCIENCES IN AT 60 EXPIRES 07/21/2007	PUNX SL	4.20	-4,201.00

Activity Search

Date	Transaction Type	Quantity	Instrument	Price	Commission	Net
2/27/2007	Bought	25.00	PUT USANA HEALTH SCIENCES IN AT 60 EXPIRES 07/21/2007 OPENING UNSOLICITED TRADE	PUNX SL	4.20	-10,502.50
2/27/2007	Bought	25.00	PUT USANA HEALTH SCIENCES IN AT 60 EXPIRES 07/21/2007 OPENING UNSOLICITED TRADE	PUNX SL	4.30	-10,752.50
1/23/2007	Sold		02/17/2007 CLOSING UNSOLICITED TRADE			
1/23/2007	Sold		02/17/2007 CLOSING UNSOLICITED TRADE			
1/18/2007	Sold (Adjustment)		CLOSING CUST UNSOL. TRADE TA 002	OC		
1/18/2007	Sold (Adjustment)		CLOSING CUST TA 003 UNSOLICITED ZERO COMM	OC		
1/18/2007	Bought (Adjustment)		UNSOLICITED TRADE	OC		
1/18/2007	Bought (Adjustment)		UNSOLICITED TRADE	OC		
1/18/2007	Sold		CLOSING UNSOLICITED TRADE	OC		
1/18/2007	Sold		CLOSING PREFERENTIAL RATE	OC		
1/17/2007	Sold (Adjustment)		CLOSING ACCT TYPE ADJUSTMENT	OW		
1/17/2007	Bought (Adjustment)		CLOSING ACCT TYPE ADJUSTMENT	OW		
1/17/2007	Sold (Rebook)		AT 17 1/2 EXPR 03-17-2007	OW		
1/17/2007	Sold (Cancel)		AT 17 1/2 EXPR 03-17-2007	OW		
1/17/2007	Sold		PREFERENTIAL RATE	OW		
1/4/2007	Bought		02/17/2007 OPENING UNSOLICITED TRADE			
1/4/2007	Bought					

ACTIVITY SEARCH

Page 3 of 3

Date	Transaction	Quantity	Instrument	Order Type	Price	Value
02/17/2007	OPENING PREFERENTIAL RATE					
11/29/2006	Bought	50.00	PUT USANA HEALTH SCIENCES IN AT 40 EXPIRES 04/21/2007 OPENING PREFERENTIAL RATE	PUNX PH	1.00	-5,350.41
11/14/2006	Bought(Cancel)	125.00	PUT USANA HEALTH SCIENCES IN AT 40 EXPIRES 04/21/2007 PUT USANA HEALTH SCIENCES IN AT 40 EXPIRES 04-21-2007	PUNX PH	0.80	10,569.26
11/14/2006	Bought(Rebook)	125.00	PUT USANA HEALTH SCIENCES IN AT 35 EXPIRES 04/21/2007 PUT USANA HEALTH SCIENCES IN AT 35 EXPIRES 04-21-2007	PUNX PG	0.80	-10,569.26
11/14/2006	Bought	125.00	PUT USANA HEALTH SCIENCES IN AT 40 EXPIRES 04/21/2007 OPENING UNSOLICITED TRADE	PUNX PH	0.80	-10,569.26
11/14/2006	Bought	50.00	PUT USANA HEALTH SCIENCES IN AT 40 EXPIRES 04/21/2007 OPENING PREFERENTIAL RATE	PUNX PH	1.70	-8,725.80
10/16/2006	Bought		OPENING PREFERENTIAL RATE	OC		
10/16/2006	Bought		OPENING PREFERENTIAL RATE	OC		
10/16/2006	Bought		OPENING PREFERENTIAL RATE	OW		
Total Trade Activity						

 Provide feedback on the usability of this page

Effective April 1, 2007, Morgan Stanley DW Inc. merged with Morgan Stanley & Co. Incorporated. Any non-historical references to Morgan Stanley DW Inc. found on ClientServ should be read to refer to Morgan Stanley & Co. Incorporated.

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Morgan Stanley & Co. Incorporated Financial Statement

**MINKOW AFFIDAVIT
EXHIBIT C**



info@frauddiscovery.net

Phone & Fax:
1-888-300-8307

February 21, 2007

Mr. Peter Del Greco, Esq.
Securities and Exchange Commission
5670 Wilshire Boulevard, Suite 1100
Los Angeles, CA 90036

Alex Rue, Esq.
Securities and Exchange Commission
3475 Lenox Rd. NE, Suite 1000
Atlanta, GA 30326

Special Agent Peter Norell
Federal Bureau of Investigations
901 West Civic Center Drive, Suite 300
Santa Ana, CA 92679

Special Agent Matt Galioto
Federal Bureau of Investigations
135 Pinelawn Road, Suite 350
South Melville, NY 11747

Special Agent Diana Nielson
Internal Revenue Service, CID
50 South 200 Street East
Salt Lake City, UT 84111-1617

Dear All;

I hope this letter finds you well. As the enclosed report indicates, the Fraud Discovery Institute has a long history of answering consumer questions about MLM's as well as submitting a detailed report on the Federal Chamber of Commerce in February of 2004. Thus, our interest in the alleged abuses of these companies is not something new.

On November 6th through November 9th of 2006 I was asked to speak by Whitney Tilson and the Value Investors Conference in New York City. I was asked to pick an industry



info@frauddiscovery.net

Phone & Fax:
1-888-300-8307

that I believed had a high likelihood of fraudulent behavior and without hesitation I picked the Multi Level Marketing industry. I spoke about 2 company's: Mannetch and Usana and disclosed to the crowd of about 400 people that during my tenure at ZZZZ Best as CEO, I never shorted a stock, not even my own, but was so convinced that the multi level marketing industry was a financial crime in progress that I had shorted both Mannetech and Usana. The crowd laughed and the disclosure was made. Specifically, in the case of Mannetech I shorted the company 150 puts and in the case of Usana I shorted the company 225 puts both in October and November of 2006.

While it is true that one of my clients, the hedge fund Laminar Portfolios, was at this convention and that they subsequently paid me \$15,000 to speak for them in Houston, Texas in January 2007; they have not hired me to do the enclosed report on Usana Health Sciences, Inc. and have not seen the report. In the interest of full disclosure, I may engage in other capital market activities based on my review and analysis of public information. Furthermore, I may provide analytical tools such as this report to third party payers in the future. Even a cursory examination of the enclosed will explain why this is the case as thousands of dollars on lab reports, investigators and experts along with my time have caused a large expense for FDI but for a good cause.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Barry Minkow".

Barry Minkow

Co-Founder

Fraud Discovery Institute

San Diego, California

www.frauddiscovery.net

cc.

Robert Frucht

Crowell & Moring LLP

153 East 53rd Street

New York, NY 10022

Bill Reavey

Buchanan, Ingersoll & Rooney

12230 El Camino Real, Suite 300

San Diego, CA 92130

**MINKOW AFFIDAVIT
EXHIBIT D**

**THE WALL STREET JOURNAL.**
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March 15, 2007

HEARD ON THE STREET

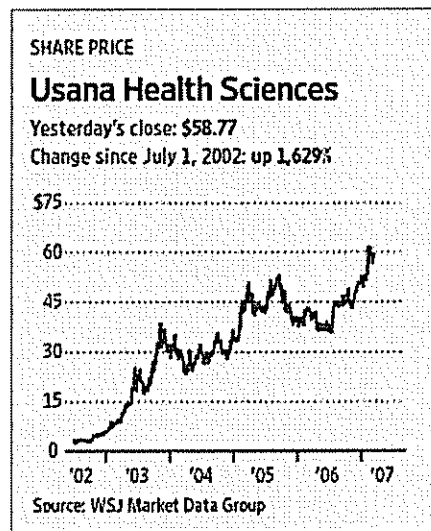
Usana Sales Plan Draws Fire From Felon Turned Gumshoe

By KEITH J. WINSTEIN
March 15, 2007; Page C1

Usana Health Sciences Inc., a marketer of vitamins and nutritional supplements, has set sales records in every one of its last 18 quarters while watching its stock price soar more than 1,600% over that time.

But the Salt Lake City-based company's unusual sales system is drawing a skeptical review from Barry Minkow, the convicted stock-fraud felon turned private investigator who has bought "put" options on Usana's shares in a bet the price will fall. Usana traded yesterday at \$58.77, up 24 cents, at 4 p.m. on the Nasdaq Stock Market and now has a market value of about \$1 billion.

Mr. Minkow is no ordinary gumshoe. After serving jail time in the 1990s for stock fraud in the ZZZZ Best debacle, he became a Christian pastor, founded a San Diego company that hunts for other potential frauds and has won praise from the Federal Bureau of Investigation. He recently helped expose Pinnacle Development Partners, an Atlanta real-estate marketer whose founder has been indicted.



Usana Health Sciences, like Amway Corp. and other "multilevel marketers," uses at-home distributors, or "associates," to sell products, according to company documents and interviews. It arranges them in a hierarchy. One person is at the very top, two distributors sit below him, four below them, eight on the next level and so on. The company pays a distributor a commission of about 8% on sales made by those below him in the hierarchy, up to a certain limit. But to be eligible for commissions, distributors must buy or refer to the company \$116 in orders each month.

Usana -- which disagrees with Mr. Minkow's analysis of it -- uses the recruitment slogan "True Health and True Wealth" and its Web site offers "high income potential." The company has said it holds 500 recruitment meetings a week around the country. About 86% of Usana's revenue comes from sales to its 153,000 associates. Only 14% comes from sales to customers

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unaffiliated with the company. Last year, the company earned \$41 million on sales of \$374 million.

Usana, which was founded in 1992, currently trades at about 27 times its 2006 per-share earnings, well ahead of the Standard & Poor's 500-stock index's multiple of 17. Analysts expect strong earnings growth of 20% this year.

Mr. Minkow says the company's sales model is unsustainable because it requires the constant recruitment of new associates. Eventually, he argues, the company will run out of distributors, who will face long odds selling products or recruiting new disciples. Usana's major product, a multivitamin, is far more expensive than rivals.

As of the end of 2005, only 37% of Usana's associates had ever earned a commission, according to the company's latest figures. Among those who had been paid, the figures show, 87% didn't earn enough to cover the \$116 they have to purchase or refer each month to qualify for commissions.

Usana says this kind of analysis misses the point. "The inherent goal isn't about coming in to, quote, break even," says Fred Cooper, the company's executive vice president of operations. Most associates are interested in purchasing the vitamins without commissions, Mr. Cooper says, and most distributors view what they can earn as a vitamin discount, not as a path to profits.

Mr. Minkow also says he is suspicious because of Usana's offshore ownership.

The company's chairman, Myron Wentz, renounced his U.S. citizenship in the mid-1990s and now claims citizenship in the Caribbean tax haven of St. Kitts and Nevis. He controls a 45% stake in Usana held by a company in the Isle of Man, in the Irish Sea, which in turn, is controlled by an entity registered in Liechtenstein.

Gilbert Fuller, Usana's chief financial officer, said Mr. Wentz renounced his U.S. citizenship because "he sees himself as a citizen of the world" and that the matter had nothing to do with the company.

Cole Chambers, of Broomfield, Colo., says he joined Usana looking for a "turn-key business." But after handing over \$700 in sign-up and activation purchases, he couldn't resell anything or recruit anyone and eventually gave up. "I feel like the vitamins are so expensive," he said. Usana says people like Mr. Chambers can take advantage of its one-year, 90% refund for products returned by distributors who quit.

Usana charges associates \$40 for a 28-day supply of its top-selling multivitamin, Usana Essentials, more than double the retail price of other premium vitamins. A premium vitamin from competitor GNC Corp., the Ultra Mega Green Multivitamin, sells for \$17 for a 28-day supply.

Usana's price is also more than 20 times that of mass-market brands like Wyeth's Centrum. Mr. Minkow says Usana looks like a pyramid scheme to him -- a fraud that works like a chain-letter, in which each new recruit has to find new members in order to profit, until the available pool of recruits dries up. Usana says it is doing nothing wrong. It says it doesn't force anybody to make the qualifying purchases.

In the past, the distinction between a pyramid scheme and a legitimate multilevel marketer has come down to a formula devised by the Federal Trade Commission.

That test looks at how much of sales are "retail," or sold to end users. Applying the formula to Usana, the company would escape classification as a pyramid scheme if at least 63% of its sales were "retail."

Deciding what a retail sale is can be tricky. Peter Vander Nat, the FTC economist who co-wrote a 2002 paper on the subject, says it depends on intent.

If people are buying because they want to use a company's products, those sales can count as "retail." If they are buying to stay in the game for future commissions, those sales wouldn't qualify, he said.

Usana says it doesn't keep track of distributors' sales to the public, but requires that at least 70% of its products be bought by "end consumers," which includes associates.

Mr. Minkow has sent a critical 500-page report on Usana to the Securities and Exchange Commission and the FBI. According to people familiar with the matter, the FBI plans to question the company. Neither the SEC nor FBI would comment.

Write to Keith J. Winstein at keith.winstein@wsj.com¹

URL for this article:

<http://online.wsj.com/article/SB117391858707537586.html>

Hyperlinks in this Article:

(1) <mailto:keith.winstein@wsj.com>

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**MINKOW AFFIDAVIT
EXHIBIT E**

NEW YORK POST

SEC EYEING USANA CHIEF

By RODDY BOYD

June 13, 2007 – The Securities and Exchange Commission is looking into a February stock sale by the chairman and chief executive of Usana Corp., a personal care product and nutritional supplements distributor.

Usana chief Myron Wentz's sale of 85,000 shares of the company's stock on Feb. 12 is one of the issues that has caught the eye of the SEC's Salt Lake City office, according to documents obtained by The Post. The regulators are examining the sale to see if Wentz had been tipped off to questions being asked by the Fraud Discovery Institute's Barry Minkow.

Executed at \$60.98, Usana's five-year high in share price, the sale netted Wentz \$51.8 million.

Minkow, who served seven years in prison for his role in the notorious ZZZZ Best stock swindle, is being sued for defamation by Usana. Since his release from prison, Minkow has made fraud investigation his life's work.

On March 19, Usana voluntarily disclosed an informal SEC inquiry over what it called "Assertions appearing in the mass media about Usana." A company spokesman said, "The company is not aware of any questions over Dr. Wentz's stock sales."

The regulators are looking at Minkow's investigation into what he alleges is Wentz's complex web of offshore stock accounts containing his 8.17 million shares, spanning from the Isle of Man to Lichtenstein, where Wentz has recently become a citizen.

David Bell, an investigator hired by Minkow to examine Isle of Man corporate filings - the locale is a leading European tax haven - said that the SEC contacted him over "the past few weeks." Bell told The Post that the SEC's questions included inquiries over "Wentz's [stock] ownership structure."

Minkow declined to comment on his communications with the SEC.

Usana hired corporate-investigation powerhouse, Kroll in late April, according to a spokesman, "to help combat misleading and inaccurate reports against Usana."

Minkow, who had tried to hire Kroll in early December and had shared with the firm much of his investigation into Wentz's stock holdings, sent Kroll an unsolicited background report on Usana, according to an e-mail thread obtained by The Post.

A Kroll spokeswoman said, "At no time did Kroll ever agree to work on Minkow's behalf."

roddy.boyd@nypost.com

Home

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**MINKOW AFFIDAVIT
EXHIBIT F**

THE NATIONAL BUSINESS REVIEW

Home » Search » 'Most people won't get their money back'

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'Most people won't get their money back'

NBR Investigation

One evening last May, about 450 people squeezed into a ballroom at Auckland's Crowne Plaza hotel where a young woman was explaining how to achieve "true health and true wealth" by selling products from Usana Health Sciences, a US-based vitamin company with thousands of distributors in New Zealand.

"Close your eyes and think about your childhood dreams," she said.

"Sing out your dreams."

There was an awkward moment, but then people started calling out visions of racecars, airplanes, fancy homes.

The woman, a Usana distributor, started flipping through a series of PowerPoint diagrams and talking about how Usana's unique compensation plan can help people achieve their dreams.

All you have to do to qualify for your own Usana business, she said, is buy an initial minimum amount of Usana business tools and health products, and then buy a certain quota of Usana products every month after that.

And that's the catch.

According to Usana corporate documents, most of the company's distributors don't make enough commissions to recover the cost of their qualifying purchases from Usana. In fact, most of the company's distributors don't make any commissions at all.

This information was obviously crucial to the hundreds of people in the Crowne Plaza ballroom who were deciding whether or not to become Usana distributors.

But the woman addressing them didn't mention it. Maybe she was not aware of it.

Nor did she mention any of the following facts:

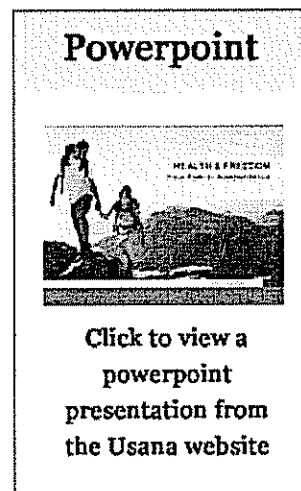
--In the US, Usana is being investigated by both the FBI and the US Securities and Exchange Commission (SEC), which regulates companies listed on the US stock market.

--Since the *Wall Street Journal* reported the FBI and SEC investigations in March, Usana's stock price on the Nasdaq has plummeted from nearly **\$US60 to the mid \$US40 range**.

--Usana shareholders have recently filed three **class action lawsuits**, claiming that the company "failed to disclose...material adverse facts" including that it "operated as a pyramid scheme."

In the US, Usana blamed its financial setbacks on what it calls "a series of false and defamatory statements" against it.

But at several recent Usana recruitment meetings attended by *NBR* in New Zealand, no one mentioned any of this. On the contrary, the speakers at these meetings said Usana's stock was soaring.



If you're thinking of joining Usana, they said, "your timing couldn't be better."

Until last autumn, Usana's performance had been dazzling, with a market value of about \$US1 billion, stock prices that had increased more than 1600 per cent in 18 quarters and sales in 14 countries including New Zealand.

With 50 per cent of the shares, Dr Myron Wentz, the company's founder and CEO, was worth hundreds of millions of dollars.

Forbes picked Usana as one of America's 200 Best Small Companies in 2004, 2005 and 2006.

Usana is a multilevel marketing company, or MLM, a rapidly expanding industry whose distributors work from home and make commissions based not only on their own sales but on sales by other distributors they recruit into the company.

Usana distributors follow a "binary compensation plan," in which one person recruits two others, those two recruit four others, those four recruit eight others, and so on.

According to several recruiting presentations *NBR* attended in New Zealand, each new Usana distributor must buy a minimum of about \$445 worth of the company's business tools and health products, then continue to buy \$290 worth of its health products every month thereafter in order to qualify for commissions.

Usana's critics say these monthly qualifying purchases are the reason so many of its distributors fail to make a return on their investments.

But Usana Executive Vice President of Operations Fred Cooper said most of the company's distributors don't think of themselves as failing — they're happy to get \$290 a month worth of Usana products for their own use, whether or not they sell anything.

In fact, Mr Cooper said Usana's research indicated that most of its distributors are "not interested in commissions."

In New Zealand, however, Usana distributors seem to be very interested in making commissions.

"WORKING HARD WON'T MAKE YOU RICH," say advertisements for recent Usana recruitment meetings in Tauranga and Wellington.

"Learn how you can fire your boss in the next 3-5 years...so you can live the lifestyle of your dreams."

And though the ads promise to explain how to improve your health with Usana products, they also say you "really can use this knowledge to become wealthy."

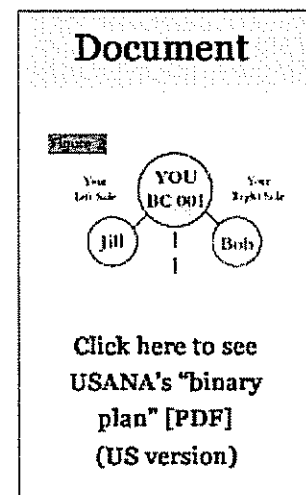
But according to government statistician Murray H Smith, very few Usana distributors are likely to become wealthy. In fact, he said, "you can make a very strong argument that this could be a pyramid scheme."

Dr Smith's opinion counts in these matters. He's been an expert witness in every one of the Commerce Commission's cases against pyramid schemes during the last 10 years.

NBR asked him to review Usana's business structure and compensation plan, and— although he was careful to state that he was qualified to make only statistical judgments and not legal judgments—he said Usana showed some of the characteristics that commonly occur in pyramid schemes:

--At any given instant, most members will not have made enough money to recoup what they've paid to participate in the company;

--The people at the top of the company structure are more likely to make money than the people at the bottom of the structure; and



--As more people join the company over time it will become harder for the majority at the bottom of the company structure to recruit others. Those people tend to become discouraged and drop out.

What Dr Smith found is supported by Usana's company documents, which show:

--87 per cent of commission-earning distributors did not make enough to recoup the cost of their monthly qualifying purchases;

--The top 7.7 per cent of Usana's commission-earning distributors made 72.2 per cent of the company's commissions; and

--The company has a "significant turnover" in its distributors every year according to its **2006 SEC filings**, and so it "must continually recruit" new distributors.

The bottom line, Dr Smith said, is that the vast majority of Usana distributors end up paying more to qualify for commissions than they actually make in commissions.

"Most people," he said, "won't get their money back."

Usana's Vice President Mr Cooper said that many of the distributors who fail or drop out simply haven't worked hard enough. He also pointed out that all distributors get something for their money— a monthly shipment of Usana health products.

If they don't like the products, he said, Usana has a generous return policy.

That may not help a lot of distributors whose businesses have failed, however. Since Usana urges distributors to take the vitamins they have to buy each month, they're not likely to have any products to return.

As to whether Usana is a pyramid scheme, the company has forcefully denied any such suggestions in press releases in the US.

Although some of its shareholders— and in a recent court filing, some of its distributors— have accused Usana of being a pyramid scheme, no court or regulatory agency has yet taken a position or made a finding on the issue.

NBR cannot say whether the allegations that Usana is a pyramid scheme are true or not. What we can say is that, in the Usana recruitment meetings we observed, audience members were never told that these court cases and investigations existed, or that they might pose a threat to the company's future.

Usana spokesman Joe Poulos brushed off the arguments about pyramid schemes, saying the concept doesn't even apply to Usana.

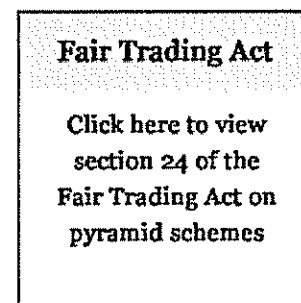
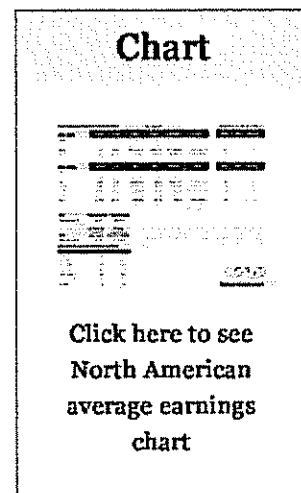
"The company sells vitamins," he said.

"In a pyramid scheme there's no product."

But that's not true in New Zealand, according to Stuart Wallace of the Commerce Commission's Fair Trading Branch. Mr Wallace has investigated numerous pyramid schemes—including companies that sold products, he said.

And he said New Zealand courts have shut those companies down and convicted their promoters.

Mr Wallace said New Zealand courts consider a number of factors in pyramid scheme cases.



But a "critical point" he said, "is whether [a company] is primarily a scheme to recruit other members or to sell products."

He added, "To what degree are their products sold to real customers, retail customers?"

Usana does not keep records of retail sales. But according to its 2006 SEC filings, the company makes **86 per cent of its net sales to its own distributors and 14 per cent** to what it calls "preferred customers," who buy products at wholesale prices.

In New Zealand and Australia — which Usana reports as one market— Usana has three times as many distributors as preferred customers.

Mr Wallace said that he could not discuss Usana specifically. But he also said that in his experience, New Zealand courts had judged pyramid schemes not only by how they paid their participants, but also by whether they had misled participants about how much money they could make.

He also said that such schemes often attract recruits with claims about passive, or residual, income— income you don't have to work for.

"The two things tend to go hand in glove," he said.

"If you're claiming you can make thousands while you're out playing golf, then that is probably an unfair scheme."

Many of Usana's promotional materials seem to fit this description.

"I don't even have to be there to earn it!" says the speaker on a Usana promotional CD that was handed out at a recent recruitment meeting in Wellington.

"We went on a cruise a while ago. We were gone for 10 days and when we got back there were two checks waiting for us—big ones—and we hadn't done anything that week but play."

At some point in their presentations, most Usana speakers are careful to say they can't promise anything, and that it takes time and work to build a successful Usana business.

But they also say that any distributor who follows Usana's plan can benefit from "the magic of residual income."

"If you understand this concept, you'll make a fortune," says the speaker on the Usana promotional CD.

"In one to five years you could retire with residual income of \$50,000, \$100,000, even \$250,000 a year."

You don't even have to be alive to make money with Usana, according to one **New Zealand-based website**:

"Imagine receiving an income of \$100,000 plus for the rest of your life...And when you die? Will it on to your children—what a legacy to leave them!"

Usana's troubles began when the company came to the attention of Barry Minkow, a former conman who spent seven and a half years in prison for perpetrating a multi-million dollar fraud in the 1980s.

Since his release from prison in 1995, Minkow has worked with the FBI and SEC on numerous investigations, including the case of New Zealand's biggest-ever fraudster, Derek Turner. (see article *NBR* July 7, **"It takes a thief to catch a thief,"**)

Fair Trading Act

Click here to view section 22 of the Fair Trading Act on misleading and deceptive conduct

Listen

Robert G. Allen speaking on USANA promotional CD (MP3, 2 min 43 secs 2.5 MB)

Document

In late February, Minkow sent the FBI and the SEC a lengthy report claiming Usana was a pyramid scheme that cheated most of its distributors out of their money.

With a theatrical air, he also told the FBI, the SEC and several reporters that he'd bought "put" options on the company's shares, so that he would make money if their price fell.

Usana shot back with a **defamation lawsuit** against Minkow, accusing him of driving down the company's stock to enrich himself and others.

"What's mindboggling to me is that Barry Minkow has admitted he's short-selling the stock," Mr Poulos said.

"You have this felon who's credited as one of the biggest fraudsters of the last century... shorting the stock and going around saying negative and misleading things about the company."

Minkow said Usana's accusations are "a joke" because he hasn't made a penny on his put options—he bought them too early. He said he doesn't even have a paying client for the case because his client backed out.

Nevertheless, he has continued his efforts against Usana.

Soon after Usana filed suit against him, he made **a series of videos on YouTube** in which he interviewed several failed Usana distributors, including Steve Estes, a blind man who claimed to have lost his life savings to Usana.

"If I had known then what I know now," Mr Estes said, "I would have run like the wind after the first Usana convention."

Minkow also turned up some embarrassing facts about Usana's executives, including Usana board member Denis Waitley who was falsely claiming to have a master's degree, and Usana medical advisory board member Ladd McNamara who was falsely claiming to have a medical license after it had been revoked in two states.

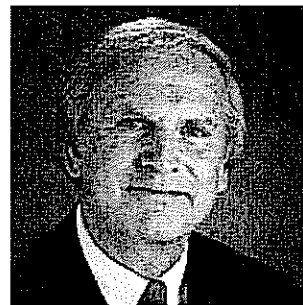
Both subsequently stepped down from their positions at Usana.

Mr Poulos said both men made harmless mistakes that had not affected Usana's operations.

"The most important point is that the company continues to grow sales year after year," he said.

He suggested that Usana's quarterly report, which is due on July 17 in the US, will confirm that.

He added, "New Zealand is a great market for Usana."



Dr Denis Waitley



Ladd McNamara

Indeed, Usana's operations in New Zealand keep humming along as if nothing was happening across the Pacific.

Usana's recruitment speakers and promotional materials here still talk about Denis Waitley and Ladd McNamara as though they'd never left their positions at the company.

Hundreds of Kiwis show up every month to Usana recruitment meetings. And according to its **latest SEC filing**, the ranks of "active" Usana distributors in New Zealand and Australia are 18,000 and growing.

The company did not report numbers of "inactive" distributors— those who had quit making their qualifying purchases of Usana products.

As for the Commerce Commission, Mr Wallace said that it was not currently investigating Usana.

"But obviously," he added, "if there was a ruling in the US one way or the other we would follow it with interest."

Auditor at troubled Usana quits

How we reported our figures: --We started with Usana's SEC filings including its most recent 10-K, 10-Q and its 2006 North American Average Earnings Chart.

--We spoke to Usana's executive vice president of operations Fred Cooper, who confirmed that the North American Average Earnings Chart is accurate and that it applies in roughly the same way to Usana's operations worldwide.

--Mr. Cooper also confirmed that 67 per cent of all distributors did not make any commissions—that's why the Chart shows only 33 per cent participating.

--Mr. Cooper said that a fair portrayal of Usana's business should deal only with the figures for commission-making distributors. So we followed his guidance and calculated the following figures using only the number of commission-making distributors.

--87 per cent of commission-earning Usana distributors don't make enough money to recover the cost of their monthly qualifying purchases from the company

--72.2 per cent of all Usana's commissions are earned by 7.7 per cent of commission-earning distributors.

--Mr. Cooper did not argue with these numbers, but he said that Usana believed most of the company's distributors were "not interested in commissions" and were happy to get their monthly qualifying purchases of vitamins for their own use. We reported that in the story.

Usana Response

Joseph Poulos, spokesman for Usana Health Sciences, has sent the following response:

To clarify statements made in the story regarding the company's earnings on July 17:

I informed you that the company would report earnings on July 17th, stating clearly that regardless of whether earnings would be positive or negative, it was a material company event that you should be aware of and might want to include in the article.

I never suggested that the quarterly earnings report would confirm that the company continues to grow sales year after year.

This statement is false. As a footnote to this whole conversation, USANA's publicly announced guidance does in fact indicate continued financial growth in sales and earnings. Joseph Poulos Vice President Financial Communications & IR Edelman

13-Jul-2007



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**MINKOW AFFIDAVIT
EXHIBIT G**



Multilevel Marketing Hard To Swallow

Evelyn M Rusli, 08 08 07, 11:25 AM ET

In February, Usana Health Sciences seemed untouchable.

Shares in the vitamin maker were roaring towards an all-time-high above \$60. The company was preparing to announce its 20th consecutive quarter of record sales. Its global empire was expanding, with the addition of Malaysia, its 14th country.

That may well have been the zenith of Usana's 15-year existence.

On March 19, Usana revealed it was the subject of an informal Securities and Exchange Commission probe into its sales practices. Then, in July, its long-time auditor abruptly and mysteriously resigned.

Now things are getting worse.

Last week, sources told Forbes.com that the FBI had launched a criminal investigation into the company. Usana says it isn't aware of any such probe. Meanwhile, Usana is suing Barry Minkow, a convicted felon-turned-fraud-buster, who penned a 500-page report alleging that the company's fantastic performance in recent years came not from selling vitamins but via a pyramid scheme that roped suckers into a multilevel marketing scheme from which few would be able to glean profits.

Usana claims Minkow improperly shorted its shares in concert with unnamed codefendants. The company alleges they arranged so-called naked short sales, creating phantom shares that put enormous pressure on the real stock price. That would have been illegal, but also a pretty good strategy: The stock has plunged 41.2% since its March high. Minkow admits to having held put options on Usana, but says he didn't profit from them and claims that he never naked shorted the stock.

"We believe everything he says to be false," Usana spokesman Joseph Poulos told Forbes.com. "He's a liar, he's a criminal—he can't be trusted."

Minkow, who has assisted federal and state authorities in 21 closed fraud cases, remains unfazed by the lawsuit, calling it a diversion to mask Usana's real problems.

Usana, Minkow alleges, is a convoluted pyramid scheme that baits consumers with promises of personal wealth and leaves them empty-handed.

Instead of offering its products in stores, Usana is a multilevel marketer, with a network of 178,000 distributors selling its line of nutritional supplements and personal-care products to consumers. In theory, distributors can make money by selling products to anybody who wants them, but they can make much bigger profits by recruiting other salespeople and getting a share of their revenue.

To get into the company's commission program, a Usana associate must front an initial fee of \$20 to \$50 for a business starter kit, buy roughly \$150 in products and then order about \$120 of goods each month, either for sale or personal use.

Minkow and other critics say Usana distributors aren't really paying for the products—they're ponying up the cash to participate in the profit-sharing network, which each can do once they've roped in two new recruits. Usana's promotional materials are emblazoned with phrases like "true wealth" and "financial freedom."

Usana disagrees, saying its members are "end users" who get involved less to make money than to enjoy Usana's vitamins at wholesale discounts. However, a customer does not have to sign up as a distributor to access the wholesale prices. One can also join as a "preferred" customer at no additional cost.

The company offers a diverse trove of nutrition and personal care products spanning from natural toothpaste to hair-care goods. Its best-selling product, however, is a 28-day pack of Essentials, a set of multivitamins and mineral supplements that wholesale for \$39.95, or \$1.43 a day. The product costs significantly more than standard retail varieties of vitamins, such as Centrum, whose multivitamins cost approximately \$7.00 for a 50-pill bottle, or 14 cents a day. Usana says its premium is justified because its products offer "high-quality, certified nutritional supplements that are in a class by themselves."

Not quite, according to Anthony Almada, the president and chief scientist of Imaginutrition, a consulting firm for the nutritional supplement industry. Almada, who has more than 30 years of experience in the industry, said Usana's vitamins are not that special. "The economic reality of Usana, and other [multilevel marketing] entities, mandates that their products invariably lack robust distinctiveness and convincing evidence of consumer relevance and superiority—achievable through rigorous clinical trials only—to their retail counterparts," Almada said.

The key question, according to James Kohm, associate director for the Federal Trade Commission's Bureau of Consumer Protection, is whether the company is really in the vitamin business. "Are they truly retail sales or simply incidental to participate in the scheme?"

Robert Fitzpatrick, the president of Pyramid Scheme Alert, who was contracted by Minkow to review Usana's structure, says there's another big problem: The company's sales model is untenable, at least from the point of view of recent recruits being able to find new distributors to work for them. "If this chain were continued just 26 levels, it would exceed the number of households in the U.S.A.," Fitzpatrick said in a recent report. "Usana's 'success' depends on the 'failures' of tens of thousands of recruits."

Usana wouldn't tell Forbes.com what portion of its distributors actually do turn a profit, but in an April conference call, Chief Financial Officer Gil Fuller said. "You only have something on the order of about 12% of people who get into this business with the intent of making money."

"The people who work at it are the ones that in fact generate the income for themselves. Those that don't, or do it for product reasons, obviously don't."

While the average distributor doesn't make enough to cover the cost of a one-month supply, the company and its senior executives have done somewhat better.

The Salt Lake City-based firm has experienced explosive growth since being founded in 1992 by Chief Executive Officer Myron Wentz. It operates in 14 countries and has 889 employees. In the last five years, the stock has skyrocketed from less than 70 cents a share on a split-adjusted basis to an all-time-high of \$61.80 in February. It ended on Tuesday at \$36.20.

In the second quarter, Usana blew past the Street's second expectations by posting profits of \$18.2 million, or 66 cents a share—above analysts' estimate of 62 cents.

From 2004 to 2006, Usana held a spot on *Forbes'* top 200 small companies list.

By the books, Usana seems to be in the prime of financial health, but Minkow doesn't buy it. He says the company is dotted with red flags.

He claims that Wentz has renounced his American citizenship and stows his 50% shareholder stake in the tax haven of Lichtenstein.

According to Minkow, company insiders wring cash out of Usana through a concert of buybacks and stock dumps. Since the summer of 2003, Usana's board and executives have sold \$100 million in shares. Meanwhile, the company has repurchased \$211 million in stock since late 2000. This week, Usana announced an additional \$50 million in repurchases.

In essence, according to Minkow, Usana is using shareholder funds to support its stock price while its insiders cash out. Not so, says Usana, which claims the aggressive buyback program reflects "management and the board's decisions to use excess cash reserves to return value to shareholders and avoid share dilution."

Then, there's the auditor situation.

Grant Thornton, Usana's auditor for more than a decade, resigned in July. Thornton did not respond to requests for comment, but in an SEC filing released Aug. 1, Usana said the firm initially disagreed with its audit committee on when to "engage independent consultants" in the company's investigation into Minkow's accusations. Usana's audit committee wanted to complete an internal investigation first before considering an independent consultant, but Grant Thornton wanted to employ an independent counsel immediately.

Fuller, Usana's CFO, said the company has not secured a new auditor. He refused to speculate on why Grant Thornton quit, aside from saying "From every indication I've been told, they were satisfied with the work," and the firm's departure "did not relate to any of the financial statements."

"It was a little bit frustrating," Fuller said. "Life is too short to dwell too much on it."

Usana has enough other problems it could dwell on.

In June, Fuller and Jerry McClain, a board member who is also a member of the audit committee, agreed to stop representing themselves as certified public accountants (they used to be). Also that month, a leading sales associate stepped down from the company's medical advisory board after Minkow revealed he no longer had a medical license—he turned over his license in 2004 after allegations surfaced that he had inappropriately doled out prescriptions to a family member. In April, Dennis Waitley resigned from the board of directors but stayed on as company spokesman soon after Minkow uncovered that he lied about having received a master's degree from the U.S. Navy (he didn't).

In addition, the company may have breached a loan covenant regarding a \$40 million line of credit from Bank of America, which could force it to pay back its borrowings. As of the end of June, the company had borrowed a little more than \$34.5 million under that facility.

According to the terms of the credit line, the company's total debt cannot be more than 2.5 times its cash flow, or earnings before interest, taxes, depreciation and amortization.

The company believes it is within those bounds because its debt load is relatively low. Even though the company lists \$35.2 million in "other current liabilities" in its second-quarter press release, Usana said a large portion of that is revenue "that we cannot recognize until the product is shipped and not an actual payment we will make to a third party."

However, after evaluating the loan document and Usana's recent filings, Don Coker, a banking specialist, said the company had less than \$4 million in deferred revenue in the first quarter and even less than that in the fourth quarter of 2006. "In my opinion, to state that the \$35 million plus in 'other liabilities' does not constitute 'debt' appears to be inconsistent with how a bank normally would make such a calculation," Coker said.

After adding the Bank of America loan and Usana's current liabilities—and subtracting \$4 million in deferred revenue—the company's consolidated funded debt totaled \$65.7 million, making its ratio 3.6-to-1. "They could be in violation of one of the covenants of their loan," said Coker, who holds a

Forbes.com - Magazine Article

<http://www.forbes.com/2007/08/08/usana-vitamins-marketing-marke...>

certificate in business valuation from Harvard Business School and has testified as an expert witness in hundreds of cases. The company disagrees, insisting that it is in compliance with the loan's covenants.

If Usana does have too much debt, Bank of America can revoke the entire loan. Bank of America did not return multiple calls seeking comment.

Faced with this tempest of controversy, Usana remains optimistic. "We have total confidence that we'll come out with flying colors on this. We're not wringing our hands over this matter," Fuller said.